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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

JUN 30 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

BEEHIVE TELEPHONE, INC. and)
BEEHIVE TELEPHONE NEVADA, INC.,)

CC Docket No. 97-249

To: The Commission

MOTION FOR STAY

Beehive Telephone, Inc. and Beehive Telephone Nevada, Inc. (collectively "Beehive"), by their attorneys, and pursuant to Section 1.106(n) of the Commission's Rules ("Rules"), 47 C.F.R. § 1.106(n), hereby request the Commission to stay the effectiveness of the June 1, 1998, *Memorandum Opinion and Order*, FCC 98-105 ("Order") pending the disposition of Beehive's Petition for Reconsideration filed simultaneously herewith. In support thereof, the following is respectfully submitted:

Introduction

The *Order* concluded the investigation of the Common Carrier Bureau ("Bureau") of Beehive's Transmittal No. 8 filed December 17, 1997 and made on a streamlined basis under section 204(a)(3) of the Act, 47 U.S.C. § 204(a)(3). In the *Order*, the Commission directed Beehive to refund to its access customers, with interest,

the difference between the actual local switching, local transport facility, and local transport termination revenues [Beehive] obtained between January 1, 1998 and the effective date of the tariffs filed in response to this order for each rate element and the local switching, local transport facility, and local transport termination revenues that they would have obtained during this period based on rates prescribed in this Memorandum Opinion and Order.^{1/}

^{1/} Order at ¶ 29.

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The Commission ordered Beehive to submit its plans for issuing refunds within thirty days of the release of the Order. In compliance with the Order, Beehive is submitting its refund plan, under protest, to the Common Carrier Bureau for its review. Beehive's submission should not, for purposes of this motion, be deemed acceptance of the Order and should not prejudice or predetermine the Commission's action on the Motion for Stay.

Argument

The traditional test for a stay requires consideration of four elements. They are whether the proponent of the stay has (1) made a strong showing that it is likely to prevail on the merits of its appeal; (2) shown that it will suffer irreparable harm if a stay is not granted; (3) shown the absence of harm to other parties; and (4) shown that the public interest would not be harmed by a stay.^{2/} Beehive submits that the four elements are met.

I. Beehive Has Made a Strong Showing That It Is Likely To Prevail On The Merits Of Its Appeal

As demonstrated by Beehive's Petition for Reconsideration, filed concurrently herewith and incorporated herein by reference, Beehive was denied a fair hearing in violation of due process. Accordingly, Beehive is likely to prevail and therefore has satisfied the first prong of the stay test.

^{2/} *Washington Metropolitan Area v. Holiday Tours*, 559 F.2d 841 (1977) citing, *Virginia Petroleum Jobbers Assn v. FPC*, 259 F.2d 921 (1958).

B. Beehive Will Suffer Irreparable Harm If A Stay Is Not Granted.

The Commission prescribed rates based on the average cost and investment of companies with a comparable number of access lines.^{3/} However, the rates prescribed by the Commission do not properly reflect Beehive's actual operating environment. Therefore, issuing a refund based on the FCC's rates will have a severe impact on the ongoing operations of Beehive's business.

Beehive's operating environment differs dramatically from most of the small LECs that serve between 800 and 1,000 access lines. Beehive's subscribers are in tiny villages scattered throughout parts of seven Utah counties and two counties in Nevada. Its combined service area consists of eight widely dispersed and sparsely populated areas in two states. See Direct Case at 9. To serve its 882 access lines, Beehive currently operates fourteen exchanges and uses a total of 1,180 route miles of cable. See *id.* Thus, Beehive only serves an average of 63 access lines per exchange and less than one access line (0.75) per route mile of cable. That makes Beehive a very high cost LEC.

The rates prescribed by the Commission bear no reasonable relation to the high cost associated with serving the remote villages in Utah and Nevada that comprise Beehive's service area. If Beehive is compelled to refund its access customers based on the unreasonable rates set forth in the *Order*, its operating income will not be sufficient to cover its operating expenses, thereby

^{3/} *Order* at ¶ 26.

threatening Beehive's ability to continue conducting its business.

It is probable that the crippling effect to Beehive's operations will occur prior to the issues in this investigation being fully resolved. If Beehive ultimately prevails, as it believes it will, the relief it is now seeking may come too late to reverse the economic impact of having issued the refund. Given the serious deficiencies of the Commission's Order, as set forth in Beehive's Petition for Reconsideration, and the adverse consequence to Beehive's operations, it is both reasonable and fair to stay the effectiveness of the Order pending final resolution of the issues.

Interestingly enough, the threat to Beehive's operations comes at a time when Beehive and the Commission are adversaries in a proceeding before the District of Columbia Circuit involving the Beehive's complaint alleging that access to the 800 Service Management System ("SMS/800") is not subject to tariff regulations under Title II of the Act. Unfortunately, the appearance of bias on behalf of the Commission is reflected in the unreasonable and unsupported rates prescribed in the Order which, if take affect, will greatly harm Beehive's operations.

C. Beehive's Customers Will Not Be Harmed If
A Stay Is Granted.

Beehive's customers will not be harmed by a grant of this stay request. In the unlikely event that Beehive does not ultimately prevail on the merits, Beehive will be required to issue the refund as required in the Order. Final resolution of the issues in this investigation, before issuance of the refund will ensure that

Beehive's customers receive only what ultimately is found to be consistent with the FCC's rules and policies.

In contrast, Beehive's customers may unnecessarily be harmed if the stay is not granted. As the Commission is aware, Beehive's subscribers are in tiny villages scattered throughout parts of nine Utah counties and two counties in Nevada. But for Beehive, most of the Company's customers would not have telephone service today because Beehive serves areas that no other company is willing to serve. The severe economic impact to Beehive which will result from issuing the prescribed refund will directly effect Beehive's ability to provide service to its customers. Before dependable service to subscribers is jeopardized, the issues of this investigation should be fully resolved.

D. Grant of a Stay Would Be in the Public Interest.

The public interest in staying the *Order* is twofold. First, as described in Beehive's Petition for Reconsideration, the Commission's *Order* is contrary to the Administrative Procedure Act's requirement that a party before an agency receive a fair hearing. It is in the public interest that the procedural defects of this investigation be cured to allow Beehive an opportunity to properly present its case before Beehive is compelled to comply with the *Order*.

Second, to issue the refund mandated by the Commission will have a serious, adverse effect on Beehive's ability to continue to provide dependable service and to improve upon its current service. Accordingly, issuance of the refund is contrary to the public

interest. If as a direct result of the Commission's *Order*, Beehive is not able to meet its operating expenses, service, which Beehive now provides to the remote villages in Utah and Nevada, may be severely disrupted. Such a result is not in the public interest, particularly since, to Beehive's knowledge, no other carrier is willing to serve this area.

As demonstrated herein, Beehive has met all four elements required for a grant of a stay of the June 1, 1998 *Order*. Beehive has (1) made a strong showing that it is likely to prevail on the merits of its appeal; (2) shown that it will suffer irreparable harm if a stay is not granted; (3) shown the absence of harm to other parties; and (4) demonstrated that the public interest would be harmed if a stay were not granted.

For the reasons described herein, Beehive urges the FCC to grant the instant Motion.

Respectfully submitted,

BEEHIVE TELEPHONE, INC. and
BEEHIVE TELEPHONE NEVADA, INC.

By:



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CERTIFICATE OF SERVICE

I, Janet M. Perry, a secretary in the law offices of Lukas, Nace, Gutierrez & Sachs, Chartered, do hereby certify that I have on this 30th day of June, 1998, sent a copy of the foregoing MOTION FOR STAY to the following:

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Janet M. Perry